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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

OPPENHEIMER & CO., INC.,

Appellant,

—v.—

MARCIA A. YOUNG,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Did the Florida Supreme Court err in holding that, notwithstanding the Supremacy Clause, the Federal Arbitration Act did not preempt a provision of the Florida Securities Act barring arbitration of state securities claims arising from transactions in interstate commerce?

PARTIES BELOW

The two parties to the proceeding in the Florida Supreme Court were Oppenheimer & Co., Inc. ("Oppenheimer"), a Delaware corporation,[1] and Marcia A. Young ("Young"), a Florida citizen.

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[1] Appellant is a wholly-owned subsidiary of Oppenheimer Financial Corporation, whose subsidiaries are: Oppenheimer & Co., Inc. (the Appellant herein), Oppenheimer Capital Corp., Oppenheimer Management Corporation, and Oppenheimer Strategic Investments, Inc. Appellant has no subsidiaries which are not wholly-owned.

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JURISDICTIONAL STATEMENT

Oppenheimer hereby submits its Jurisdictional Statement on this Appeal from a decision of the Supreme Court of Florida, which refused to apply the Federal Arbitration Act to a state securities law claim arising from transactions in interstate commerce and covered by an arbitration agreement.

PRIOR OPINIONS

The decision of the Florida Supreme Court, from which this appeal is taken, is reported at 456 So.2d 1175 (Fla. 1984). In that decision, the Florida Supreme Court affirmed the decision of the Third District Court of Appeal, reported at 434 So.2d 369 (Fla. 3d DCA 1983). The appellate court had quashed the trial court's order compelling arbitration of Young's state securities law claim. The opinions of the Florida Supreme Court and of the Third District Court of Appeal appear in the Appendix to this Jurisdictional Statement (hereinafter "App.") at App. 1a-8a and App. 1b-8b.

JURISDICTION

The Florida Supreme Court decision became final on October 12, 1984. Oppenheimer's notice of appeal, which was filed with the Florida Supreme Court on November 30, 1984, appears at App. 1d.

Jurisdiction of this appeal is conferred on this Court under 28 U.S.C. §1257(2). Jurisdiction is authorized under *Southland Corp.* v. *Keating*, 104 S.Ct. 852, 856-57 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this appeal and are set forth in the Appendix:

1. The Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2. (App. 1e.)

2. Sections 1-3 of the Federal Arbitration Act, 9 U.S.C. §§1-3 (1976). (App. 1e-2e.)

3. Sections 14 and 16 of the Securities Act of 1933, 15 U.S.C. §§77n and 77p (1976). (App. 2e.)

4. Section 517.241 of the Florida Securities Act, §517.241, FLA. STAT. (1981). (App. 3e.)

STATEMENT OF THE CASE

Young sued Oppenheimer, a securities broker-dealer, claiming that Oppenheimer violated the Florida Securities Act and committed common law fraud, breach of fiduciary duty and negligence in handling her brokerage account. The trial court, following the Supremacy Clause and the Federal Arbitration Act, granted Oppenheimer's motion to compel arbitration based upon a provision in the agreement between the parties requiring arbitration of disputes. The trial court's order is reprinted at App. 1c-3c. The Florida intermediate appellate court quashed the trial court's order and held that the disputes must be litigated, not arbitrated.

The Florida Supreme Court held that a provision of the Florida Securities Act bars arbitration of state securities law claims, and that, notwithstanding the Supremacy Clause, the

Federal Arbitration Act does not preempt that provision of Florida law.

The question raised in this appeal was raised at all three levels of the Florida courts:

(a) In the trial court, the question was presented by written motion, memorandum and oral argument.

(b) In the Third District Court of Appeal, the question was presented by Oppenheimer's brief and oral argument.

(c) In the Florida Supreme Court, the question was presented by Oppenheimer's initial brief, its reply brief and oral argument.

REASONS REQUIRING PLENARY CONSIDERATION BY THIS COURT

A. Introduction

This appeal presents a serious challenge by the courts of the State of Florida to the supremacy of federal law, specifically the Federal Arbitration Act. Perhaps reflecting an archaic aversion to arbitration, the Florida Supreme Court held that the Federal Arbitration Act does not preempt a provision of the Florida Securities Act barring arbitration of state securities law claims.

Characterizing seemingly binding precedent of this Court, *Southland Corp.* v. *Keating*, 104 S.Ct. 852 (1984), as "off point," App. 6a, the Florida Supreme Court ignored *Southland's* pronouncement against state attempts to evade the requirements of the Federal Arbitration Act. That Act establishes as a matter of federal substantive law that arbitration agreements arising from transactions in interstate commerce must be enforced by federal and state courts. The Florida Supreme Court recognized that the state securities act and the Federal Arbitration Act produced inconsistent results, but held that *Wilko* v. *Swan*, 346 U.S. 427 (1953), mandated that

state securities law claims could not be arbitrated.[2] *Wilko* held only that certain federal statutory securities law claims could not be arbitrated. It did not deal, expressly or impliedly, with state securities law claims, but rather dealt solely with "arbitration of issues arising under the [Securities] Act [of 1933]." 346 U.S. at 438 (brackets added).

Arbitration agreements play a major role in settling disputes between stockbrokers and their customers. This is especially true in Florida, one of the nation's busiest investment centers. Because of the decision below, Florida stockbrokerage firms can no longer arbitrate state securities law claims. Thus, the effect of the decision will be to increase court congestion and to frustrate the national policy enunciated by this Court in *Southland* and in other decisions in favor of arbitrating disputes involving interstate commerce. This result will be compounded as other states follow the lead of Florida in refusing to arbitrate state securities claims.

The Florida Supreme Court has seriously misread *Wilko* and *Southland*. Its decision undermines this Court's clearly expressed pronouncements that the Federal Arbitration Act constitutes federal substantive law equally applicable in state and federal courts. Its decision also directly conflicts with this Court's recent holding in *Southland* that the Federal Arbitration Act is not subject to any state-created exceptions. This Court should therefore give plenary consideration to this appeal to protect the supremacy of Federal law in this vital area of securities litigation.

B. The Federal Arbitration Act Preempts All Inconsistent State Law Provisions

The Federal Arbitration Act enacts a body of federal substantive law of arbitration which is applicable in both state and federal courts "to any arbitration agreement within the

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[2] The Florida Supreme Court also denied arbitration of Young's common law claims. The issue of arbitrability of "intertwined" claims is presently before this Court in Byrd v. Dean Witter Reynolds, Inc., 726 F.2d 552 (9th Cir.), *cert. granted*, 104 S.Ct. 3509 (1984) (No. 83-1708).

coverage of the Act." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 103 S.Ct. 927, 941 (1983). In *Southland Corp.* v. *Keating*, 104 S.Ct. 852 (1984), this Court held that a provision of the California Franchise Investment Law barring arbitration of state franchise claims directly conflicted with the Federal Arbitration Act and thus was invalid under the Supremacy Clause. The *Southland* Court expressly rejected the California legislature's attempt to enact an exception to the Federal Arbitration Act:

> In enacting §2 of the federal [Arbitration] Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . . Congress has thus mandated the enforcement of arbitration agreements.
>
> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce" and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract." *We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under State law.*

Id. at 858 (footnote omitted; emphasis and brackets added).

C. There is No Exception for State Securities Law Claims

The Florida Supreme Court, however, rejected *Southland*, finding that the *Southland* Court "simply recognized that a franchise is not typically a security and [that there is no] analogy between franchise regulation and securities regulation." App. 6a (brackets added). The Florida Supreme Court also rejected *Kroog* v. *Mait*, 712 F.2d 1148 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1001 (1984), in which the Seventh Circuit held that, notwithstanding *Wilko*, the

Federal Arbitration Act preempted a provision of the Wisconsin blue-sky law barring arbitration of state securities claims.

The rationale of the decision of the Florida Supreme Court is contained in the following language of its opinion:

> It is true that if we looked only at the text of the FAA [Federal Arbitration Act] we would find conflict between preemptive federal law and our decision here. What [Oppenheimer] overlooks is that we are obliged not only to look at federal statutes but at controlling case law from the Supreme Court interpreting these statutes. In *Wilko* the Court interpreted both federal securities law and the FAA and held that the FAA did not require arbitration of disputes concerning interstate securities transactions. Thus, we see no conflict between our decision here and federal law.

App. 7a (brackets added).

The decision below is based on the erroneous assertion that this Court held in *Wilko* "that the FAA did not require arbitration of disputes concerning *interstate securities transactions*." *Id.* (emphasis added). *Wilko* holds no such thing, nor does it even mention state securities claims or "interstate securities transactions."[3]

In *Wilko* this Court interpreted Section 14 of the Securities Act of 1933, 15 U.S.C. §77n, the "anti-waiver" provision of the federal Securities Act, as barring arbitration of certain federal statutory securities claims. Section 14 of the Securities Act of 1933 provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with *any provision of this title or of the rules and regulations of the [Securities and Exchange] Commission*

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[3] The concept of so-called "interstate securities transactions" relied upon by the Florida Supreme Court has no foundation in the federal securities laws. The attempt to merge federal and state securities law claims by the use of this terminology must fail, since federal and state securities laws are separate and distinct, and spring from different sovereignties.

shall be void." 15 U.S.C. §77n (emphasis and brackets added). This Court held in *Wilko* that the federal anti-waiver provision was not overridden by the Federal Arbitration Act, which provides that arbitration agreements involving transactions in interstate commerce are "valid, irrevocable, and enforceable. . . ." 9 U.S.C. §2. Thus, *Wilko* recognizes a single, narrow *Congressional* exception to the Federal Arbitration Act solely for federal securities law claims.

This Court recently concluded that *Wilko* does *not* empower a state legislature to prohibit arbitration of claims within the purview of the Federal Arbitration Act. *Southland Corp.* v. *Keating*, 104 S.Ct. 852, 861 n.11. Furthermore, this Court has given no indication that the anti-waiver provision of the Securities Act of 1933 was intended to prevent the Federal Arbitration Act from applying to state securities law claims. It is illogical and inconsistent with the trend of the decisions in which this Court has read the Federal Arbitration Act expansively to hold, as did the Florida Supreme Court, that Section 14 of the Securities Act of 1933, which by its terms is limited to federal securities law claims, encompasses *state* securities law claims as well.[4] Thus, regardless of whether *Wilko* would be decided differently today,[5] the Florida Supreme Court clearly erred in relying on that decision and on the federal anti-waiver provision to conclude that state securities law claims could not be arbitrated.

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[4] This conclusion is reinforced by reference to Section 16 of the federal Securities Act, 15 U.S.C. §77p (1976), which provides: "The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity." This suggests that Congress intended that the reach of the federal anti-waiver provision be strictly limited, according to its terms, to claims arising under the federal Securities Act.

[5] In Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), this Court limited *Wilko* by refusing to apply it to federal securities claims arising from international securities transactions. We note that this Court has recently granted cross petitions for *certiorari* in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983), *cert. granted*, 53 U.S.L.W. 3289 (U.S. Oct. 15, 1984) (No. 83-1569) and (No. 83-1733), which raise questions of arbitrability of antitrust claims in an international dealer dispute.

The Florida Supreme Court also erred by applying the wrong test under the Supremacy Clause. The court should have focused on the question whether the state securities act provision conflicted with the Federal Arbitration Act. The court recognized that under that analysis the blue sky law would be preempted by federal law. To avoid that result, the court incorrectly focused on the question whether the state securities law provision conflicted with the federal securities laws. As the Seventh Circuit held in *Kroog* v. *Mait*, 712 F.2d 1148, 1153-54 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1001 (1984), this was an erroneous analysis of the federal preemption question.

This Court has repeatedly stressed this nation's policy of enforcing contractual arbitration clauses, and there is no area of commerce in which arbitration plays a more significant role than that of securities transactions. Because of the decision below, a major federal statute—the Federal Arbitration Act—has been written out of Florida law in the important area of state securities disputes. Other states adhering to ancient prejudices against arbitration will undoubtedly follow the Florida Supreme Court if this Court were to permit the decision to remain undisturbed.[6] Unless halted, state courts could deal a serious, if not lethal, blow to the supremacy of federal law in this area of securities regulation.

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6 In Alabama Oxygen Co. v. York Int'l, 433 So.2d 1158 (Ala. 1983), *vacated*, 104 S.Ct. 1260 (1984), the Alabama Supreme Court concluded that the Federal Arbitration Act did not preempt a provision of Alabama law prohibiting arbitration in that state. On the heels of *Southland*, this Court vacated the Alabama judgment and remanded "for further consideration in light of [*Southland*]." York Int'l v. Alabama Oxygen Co., 104 S. Ct. 1260, 1260 (1984) (brackets added).

CONCLUSION

By its recent decisions, this Court has carefully attempted to protect against state attempts to frustrate our national policy in favor of arbitrating disputes arising from transactions in interstate commerce. The Supreme Court of Florida has threatened to undermine this national policy favoring arbitration.

For these reasons, Oppenheimer respectfully submits that this appeal presents substantial federal questions requiring full consideration by this Court.[7]

Respectfully submitted,

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[7] If this Court should conclude that this case does not arise within its appellate jurisdiction, Oppenheimer respectfully requests that this Jurisdictional Statement be treated as a petition for writ of certiorari, in which case jurisdiction is invoked pursuant to 28 U.S.C. §1257(3) (1976). *See* 28 U.S.C. §2103 (1976).